IN THE

Supreme Court of the United States

October Term, 1942.

No.....

OSKAR TIEDEMANN and ESTONIAN STATE STEAMSHIP LINE,

Petitioners,

vs.

ESTODURAS STEAMSHIP COMPANY, INC., Claimant of the Steamship "FLORIDA" (formerly the "SIGNE").

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

POINT I

The decision below is in direct conflict with that of the Circuit Court of Appeals of the Third Circuit in the case of *The Denny*, 127 Fed. 2d 404 (1942).

The decision below is in direct conflict with that of the Circuit Court of Appeals of the Third Circuit in THE DENNY, 127 Fed. 2d 404 (C. C. A. 3rd—1942). In that case

the Circuit Court of Appeals of the Third Circuit, on a state of facts legally identical with the instant case, upheld in full libelant's claim. The Court therein stated:

> *"We may not ignore the fact that the Soviet Socialist government did actually exercise governmental authority in Lithuania at the time the decrees in question were made and the powers of attorney were given, but must treat its acts within its own territory as valid and binding upon its nationals domiciled therein. It follows that the respondents may not question in this court the validity of the Lithuanian decrees insofar as concerns their effect upon the interests of the former members of the associations therein or the validity of the powers of attorney executed by the association's officers and offered in this proceeding."* (The Denny, 127 F. [2d] 404 at 410, C. C. A. 3rd [1942].) (Italics ours.)

The Court below, therefore, in refusing to give libelants possession of the FLORIDA is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in THE DENNY, *supra*. Both reason and authority strongly support that decision of THE DENNY as correct, and must persuade this Court to resolve this conflict in the decisions of the two Circuit Courts of Appeals by granting the writ herein, as requested.

POINT II

The decision of the Court below departs from the accepted and usual course of judicial proceedings by establishing judicial review in United States Courts of the acts of a *de facto* foreign government affecting only personal and property rights of its own citizens.

The decision below departs from the accepted and usual course of judicial proceedings by establishing judicial review in the Courts of the United States of an act of a *de facto* foreign government which affected only the property rights of citizens of that country.

This action by the Court below is in direct conflict with the decision of this Court in *U. S.* v. *Belmont*, 301 U. S. 324 (1937), where this Court said:

> "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled" (p. 332).

Judicial review of executive and legislative acts is circumspectly exercised even in regard to our own coordinate branches of government. That such judicial review should be extended by United States Courts to acts of a foreign *de facto* government, with which we do not even have diplomatic relations, is fantastic. The failure of our State Department to grant political recognition to Estonia, S.S.R., does not expand the authority of United States Courts to review the public acts of that government affect-

ing its own nationals. As this Court has stated in *U. S.* v. *Pink*, 315 U. S. 203 (1942):

> "The conditions for 'enduring friendship' between the nations * * * are not likely to flourish where contrary to national policy a lingering atmosphere of hostility is created * * *" (pp. 232, 233).

The decision in the instant case not only accentuates a "lingering atmosphere of hostility" toward the acts of a State of the Russian government, but announces that such acts will be repudiated and rejected in the United States Courts if for some reason they displease our Courts. It declares judicial warfare on our military ally. For this clear departure from the accepted and usual course of judicial proceedings the judgment of the Court below should be reversed.

POINT III

The decision of the Court below is in conflict with applicable decisions of this Court which hold that the civil decrees of a *de facto* government affecting personal and property rights are effective regardless of political recognition or non-recognition of such government.

The decision below is in conflict with applicable decisions of this Court which hold that the civil decrees of a *de facto* government affecting personal and property rights are effective, regardless of the political recognition or non-recognition of such *de facto* government.

This Court has frequently considered this problem in the past, as in a series of cases arising out of the Civil War.

There the question was raised as to whether personal and property rights established by the *de facto* but politically unrecognized State governments of the South should be judicially recognized after the war. Such acts of the *de facto* governments of the Southern States were uniformly upheld, except where they involved hostile activity towards the United States.

In the leading case of *Texas* v. *White,* 74 U. S. 700 (1869) this Court described some of the acts of a *de facto* government which are recognized as valid with or without diplomatic recognition. These are such for example:

> "* * * as Acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, *regulating the conveyance and transfer of property, real and personal,* and providing remedies for injuries to person and estate, and other similar Acts, which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government. * * *" (Italics ours.) (p. 733.)

This view was confirmed in:

U. S. v. *The Insurance Companies,* 89 U. S. 99 (1875);
U. S. v. *Rice,* 17 U. S. (4 Wheat) 246 (1819);
Mauran v. *Insurance Company,* 73 U. S. 1 (1867);
Thorington v. *Smith,* 75 U. S. (8 Wall) 1 (1868);
U. S. v. *Thomas,* 82 U. S. (15 Wall) 337 (1812);
Williams v. *Bruffy,* 96 U. S. 176 (1867);
Keith v. *Clark,* 97 U. S. 454 (1878);
Sprott v. *U. S.,* 87 U. S. 459 (1874);
Ford v. *Surget,* 97 U. S. 594 (1878);
Baldy v. *Hunter,* 171 U. S. 388 (1898);

MacLeod v. *U. S.*, 229 U. S. 416, 33 Supreme Court 955 (1913);
U. S. v. *Belmont*, 301 U. S. 324 (1937);
U. S. v. *Pink*, 315 U. S. 203 (1942).

Legal scholars have unanimously reached the same conclusion, after studying the decisions and the factual situation in these matters.

The leading student of this subject, Dean Edward D. Dickinson of the University of California Law School, writing in 22 Mich. Law Review 29 (1923), stated:

> "The recognition of a foreign government or state is exclusively a political question. The existence of a foreign government or state is exclusively a question of fact * * * there appears no good reason at all why in suits between individuals about matters of private right, the courts should not frankly take cognizance of unrecognized *de facto* governments or states, and of their capacity to affect private rights in a great many different ways * * * the situation may become * * * serious if courts feel constrained * * * to ignore what is going on abroad in a rather intricately integrated world."

To the same effect are Am. Journal of Intn'l Law, April, 1925, Vol. XIX, No. 2 (pp. 267, 268), Louis Connick, 34 Yale Law Journal 499 (1925), Osmond Fraenkel, 25 Columbia Law Review 544 (1925), Edwin M. Borchard, 26 Amer. Journal of International Law (1932).

The New York State Court of Appeals has considered this matter twice in deciding the same issue regarding private property rights created under the Russian government, while that government was unrecognized.

That Court said in *Salimoff & Company* v. *Standard Oil Company,* 262 N. Y. 220, 186 N. E. 679 (1933):

> "To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country, is to give fictions an air of reality which they do not deserve.
>
> "The Courts cannot create a foreign wrong contrary to the law of the place of the act. The cause of action herein arose where the act of confiscation occurred and it must be governed by the law of Soviet Russia. According to the law of nations it did no legal wrong when it confiscated the oil of its own nationals and sold it in Russia to defendants. Such conduct may lead to governmental refusal to recognize Russia as a country with which the United States may have diplomatic dealings. * * * The government may be objectionable in a political sense. It is not unrecognizable as a real governmental power which can give title to property within its limits."

To the same effect is *Wulfsohn* v. *Russian Republic,* 234 N. Y. 372 (1923).

This Court in considering the same question in the recent case of *U. S.* v. *Pink,* 315 U. S. 203 (1942) reiterated its former stand by stating that:

> "No manner of speech can change the central fact that here are moneys which belong to the Russian company and for which the Russian Government has decreed payment to itself."

Under these decisions the opinion of the Court below is in conflict with all applicable decisions of this Court,

in conflict with all legal scholarship in this field, and in conflict with the highest State Court which has considered this question.

POINT IV

The Court below has wrongfully decided an important question of Federal Law which has not been decided by this Court in its refusal to grant letters rogatory for the procurement of relevant testimony abroad as requested by libelants.

The Court below has wrongfully decided an important question of Federal Law which should be, but has not been, decided by this Court. That is, in its refusal to grant letters rogatory (Rec. p. 45) for the taking of testimony of O. Tiedemann, libelant's principal, and managing owner of the ship FLORIDA prior to July 28, 1940 (Libelant's Exhibits "R", "S", "T", Rec. pp. 269, 270, 271).

Without any direct evidence in the record, and on nothing but the hearsay statements of a witness who was an adverse claimant to this ship, the Court below found that the authority of libelants here was "conferred by said Tiedemann when under duress * * *" (Rec. p. 378).

Respondents below were allowed to produce this claim of duress from a witness who was not there and who had no official information regarding the matter (Rec. pp. 128 and 129). On the basis of his non-presence and non-information he gave a very certain picture of intimidation and oppression (Rec. p. 145 *et seq.*).

Libelants sought to answer these hearsay aspersions by the taking of direct testimony under letters rogatory requesting the Supreme Court of the Russian Soviet Federated Socialist Republic to obtain such testimony. The United States has a compact with the Soviet Union providing for the taking of such testimony under such circumstances. (Exchange of notes on November 22, 1935, at Moscow, U. S. S. R. between U. S. Ambassador William C. Bullitt and M. Litvinoff, People's Commissar for Foreign Affairs.)

Lower Federal Courts have indicated that issuance of letters rogatory under such circumstances may be a matter of right (*U. S.* v. *Hoffmann*, 24 Fed. Supp. 847 (1938); *In re*: *National Equipment Company*, 195 Fed. 488, 115 C. C. A. 398, Cert. Den. 225 U. S. 701). There is no determination by this Court on this important question.

POINT V

The decision of the Court below is in conflict with an applicable decision of this Court in so far as it allows the consul of a foreign government, in the absence of specific powers given to him by competent authority, to receive the proceeds of property belonging to his nationals.

The Court below permitted Kaiv, who was the consul of an extinguished government, to receive the proceeds of this property. Such action is in direct conflict with an applicable decision of this Court which has been enforced for more than one hundred and twenty years.

In the *Bello Corrunes*, 6 Wheat 152 (1821) this Court said:

> "Whether the powers of the Vice Consul shall in any instance extend to the right to receive in his national character the proceeds of property libeled and transferred into the registry of the court, is a question resting upon other principles. *In the absence of specific powers given to him by competent authority such a right would certainly not be recognized.*" (Italics ours.) (pp. 168, 169).

POINT VI

The decision of the Court below in allowing an adverse party to retain possession of the *Florida* "in trust" has clearly departed from the accepted and usual course of judicial proceedings by allowing an adverse claimant to act as trustee for a reversionary interest.

The Court below allows respondent Kaiv to retain possession of the FLORIDA, "in trust" for a period of time apparently measured by the duration of the war. Kaiv is an adverse claimant to this ship. To allow him to serve as the "trustee", therefore, is an extreme departure from the accepted and usual course of judicial proceedings and calls for an exercise of this Court's power of supervision.

The Court below states that Kaiv "declared himself trustee of this ship and assumed control of its affairs" (Rec. p. 407). Without comment on the peculiar doctrine that a man may "declare himself trustee", it is enough to state that under the uniform holdings of this Court, and the highest equity Courts of the States, and of the British Empire, an adverse claimant to a property is not a qualified trustee.

Libelant under any theory of this case has a reversionary interest in the FLORIDA. When Estonia S.S.R. is recognized politically by the United States, the title of libelant, Estonian State Steamship Line, will be retroactive, as such recognition "will validate all the actions and conduct of the government so recognized from the commencement of its existence."

> *Oetjen* v. *Central Leather Company,* 246 U. S. 297 (1918). (p. 303.)

The Court below concedes that "the status of Estonia as a nation will be determined by future events" (Rec. p. 408).

The Soviet Union has made it amply clear that the Baltic states are to be restored permanently to the Russian mother country at the conclusion of the war.

As Pravda, a Soviet organ, stated on February 10, 1943:

> "Do there not exist curious persons who are ready to present to the Soviet Union parts of the latter's own territory as, for instance, the Baltic republics? These persons pretend not to know that the basic law of our country—the Constitution of the U.S.S.R.—has fixed the ties between these republics and the other Union Republics, and that the Red Army heroically fights for the honor, independence and integrity of our State." (As reported in the New York Times, Saturday, February 13, 1943.)

It seems amply clear thereby that even under the most unfavorable construction of libelants' position as placed by the Court below, libelants possess a reversionary interest in the FLORIDA now held "in trust" by Kaiv.

That being so, Kaiv is a totally unsatisfactory trustee. Kaiv is an hostile party and an adverse claimant to libelants

who represent a reversionary interest. Though representing a government which abolished political parties in 1935, he sneers at an Estonian election held in 1940 as, "when the Communists oppressed the people in the proclaimed so-called election" (Rec. p. 103).

As this Court stated in *May* v. *May*, 167 U. S. 310 (1896):

> "The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever *such a state of mutual ill-feeling*, growing out of his behavior, exists between the trustees, or between the trustees in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than *that human infirmity would prevent the co-trustee or the beneficiaries from working in harmony with him*, and although charges of misconduct against him are either not made out, or are greatly exaggerated. * * *" (Italics ours.) (pp. 320, 321.)

See also: *In re*: *Tempest* (1866), 1 Chan. App. 485, 35 L. J. Chan. 632, 14 Law Times 688.

The uniform rule of State Courts is that mutual hostility between the trustee and his beneficiaries unfits the trustee for the performance of his duty. The Supreme Court of Massachusetts stated this succinctly in *Wilson* v. *Wilson*, 145 Mass. 490 (1888), at 493:

> "Everyone instinctively feels that a state of *mutual hostility* between the trustee and such a beneficiary * * * unfits him to a greater or less degree, for the fair execution of the trust." (Italics ours.)

In an even firmer statement of the same policy the Circuit Court of Appeals of the Sixth Circuit, in *Sunday School Union, etc.* v. *Walden,* 121 Fed. 2d 719 (1941) stated:

> "*The presence of friction,* resulting in litigation and bad feeling, even in a case where the trustee's integrity and intelligence of management are above reproach requires removal of the trustee" (pp. 724, 725). (Italics ours.)

The Court below, therefore, has made a clear and violent departure from the accepted and usual course of judicial proceedings in appointing an adverse claimant, Kaiv, to hold this ship "in trust" for the libelants, its likely reversioners, in view of the open hostility between Kaiv and such libelants.

Kaiv is, aside from this, unqualified to serve as trustee of a large fund by reason of his undemonstrated financial ability. Libelant is still painfully reminiscent of the custody exercised by the former Kerensky officials, during the period of 1917 to 1933. These officials retained formal diplomatic status just as does respondent Kaiv in this case, and in 1933 when these claims were finally turned over to the United States Government for the benefit of U. S. creditors, the balances were depleted and the accounts confused.

Kaiv is, therefore, wholly unfit to hold this ship "in trust", both because he is an adverse party and because he is a person of no demonstrated financial responsibility. Such departure from this usual and accepted course of judicial proceedings on the part of the Court below calls for the exercise of this Court's power of supervision.

POINT VII

The finding of the Court below that libelant Tiedemann signed his power of attorney in this case under duress is unsupported by any legally admissible evidence whatsoever.

There is no admissible evidence whatever in the record of this case of duress on libelant Tiedemann. Respondent Kaiv, an adverse party, after admitting that he was not there and had no direct communication with Estonia (Rec. pp. 128 and 129), was allowed to recite in detail in the record evils which his non-presence and non-communication disclosed to him regarding affairs in Estonia as of those dates (Rec. pp. 143 and 145 *et seq.*). Objection was taken to this entire line of testimony (Rec. p. 134). This testimony was acknowledged by the Court below to be hearsay (Rec. p. 130). Yet the Court below states that the evidence "fully supports the finding of the lower Court that he (Tiedemann) was under duress of the Russian authorities when he made and executed the cabled power of attorney * * *" (Rec. pp. 407, 408). The record utterly fails to support such conclusion. The decision below far departs, therefore, from the usual and accepted course of judicial proceedings.

POINT VIII

The Court erred in stating that "the record lacks clear and convincing proof of ownership by libelants * * *."

The record contains the decree under which this ship was nationalized (Libelant's Exhibit A, Rec. p. 254), and the decree of the U. S. S. R. No. 2131, organizing the Estonian State Steamship Line (Libelant's Exhibit B, Rec. p. 255). In the file before the Court is contained the power of attorney, duly authenticated before the American Vice-Consul in Moscow, by which this corporation, holding title under the aforesaid decree, authorized libelant to bring this action. It would be impossible to present any proof more "clear and convincing" on an issue of title or authority. The decision below is based on a clear error, therefore, which requires the issuance of this writ.

POINT IX

The Court below has decided an important question of Federal Law which must ultimately be decided by this Court in the matter of treatment to be given to the acts and decrees of the Baltic States of the Soviet Union subsequent to June 17, 1940.

On June 17, 1940 the Russian Army reoccupied the three Baltic States of Estonia, Latvia and Lithuania, and restored these three provinces of Russia to the mother country. They had been dismembered from Russia by force in 1918, by the Germans, and had maintained a brief

and precarious independent existence for about twenty years, after nine centuries of almost continuous status as part of the Russian State.

The pretended independence of the Baltic States became more and more a myth as they moved more completely into the Nazi orbit. In 1934 Premier Karlis Ulmanis declared himself Dictator of Latvia and the Nazis proudly hailed him as "Fuehrer Premier Ulmanis" [Prof. Edgar Tatarin Tarnheyden, Archiv des Offentlichen Rechts Neu Folge 26 band 3 Heft 1935, p. 264].

One year later Estonia followed suit by a decree abolishing political parties (Encyclopedia Brittanica, Estonia, 1942 Edition), and the situation was accurately appraised by the Soviet Union as follows:

> "During the last years of their existence the Governments of Latvia, Lithuania, and Estonia showed by all their behaviour that they were prepared to aid Hitler in every way, and to make it easy for him to seize the Baltic States." ("The Soviet Union, Finland and the Baltic States," published in 1941 by the Soviet Information Bureau, Coop. Ptg. Soc. Ltd. Tudor St. Ecy, London, England.)

The Russian occupation of these provinces as a means of restoring them to the Russian mother country on June 17th, 1940, therefore, came none too soon to prevent them from being used actively as invasion bases against Russia one year later.

Our State Department, with the same fine sense of unreality which distinguished its attitude toward the Kerensky Government from 1917 to 1933, has refused to recog-

nize these States of the Soviet Union diplomatically. This does not alter the fact, however, that those States have issued a number of decrees, and conducted public business as *de facto* governments steadily since that time as members of the Russian Federation of Republics. The Court, therefore, must decide these questions "just as it would decide other judicial questions, without advice or suggestions from the political branch of the Government." (*Anderson* v. *N. V. Transandine etc.*, 299 N. Y. 9, 43 N. E. 2d 502 (1942).

While Estonia S.S.R. is presently overrun by German arms again, its status as a part of the Soviet Union is definitely fixed by official statements of the Russian government (Pravda *supra.*)

A large number of legal questions will most likely be presented in American Courts regarding the acts and decrees of these governments.

The instant case presents one of these issues in concise and direct form. The writ of certiorari should be granted herein, therefore, as a means of fixing these rights and establishing now the legal as contrasted with the political status of these *de facto* Baltic States of the Russian Government.

CONCLUSION

For the reasons above stated, therefore, libelant respectfully urges that the petition for certiorari in the instant case should be granted.

Dated, May , 1943.

CHARLES RECHT,
10 East 40th Street,
New York City,
New York.

PAUL J. KERN,
Of Counsel.